Supreme Court U.S.
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No.

IN THE

Supreme Court of the United States

PHILIP J. TAVERNA, D.D.S.,

Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA, BUREAU OF PROFESSIONAL AND OCCUPATIONAL AFFAIRS, STATE BOARD OF DENTISTRY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

The Pennsylvania Supreme Court failed to recognize the recent holding of this Honorable Court in *Jones v. Flowers,* and its progeny, which discussed the importance of actual notice in a case. Even though the decision has been followed in other courts, including the District Court of Pennsylvania, by the decision below the Pennsylvania Supreme Court has determined that the *Jones* decision was inapplicable in a case involving a state licensing board. Different standards of notice must not be allowed between the judicial system and licensing boards.

The Petitioner argues and submitted substantial evidence that he did not receive notice for the audits by the licensing board. There was no evidence that the notice for the first audit was received by the petitioner, and then it expired. With respect to the notice for the second audit, it was undisputed that the notice was unclaimed. By not receiving notice and having an unwarranted fine and public reprimand, the Petitioner was severely prejudiced and his constitutional rights were violated. The Petitioner was subjected to the maximum fine of the Board even though the issue did not surround the treatment of his patients or a consumer complaint, but documents to support an audit of continuing education. In fact, the documents proved that the Petitioner surpassed the minimum continuing education requirement. Moreover, the Petitioner was also found guilty of a crime not stated in the statute. Licensing authorities cannot overextend its authority as established in the statutes and substitute it for

the judicial process. Furthermore, the licensing authority must be prevented from creating its own standard of notice which violate this Court's decisions and clear standards to meet the due process requirements.

A. **WHETHER THE PETITIONER'S CONSTITUTIONAL RIGHTS WERE VIOLATED SINCE HE DID NOT RECEIVE NOTICE AS ESTABLISHED BY RECENT UNITED STATES SUPREME COURT CASES RESULTING IN AN IMPERMISSIBLE SANCTION FOR AN ALLEGED VIOLATION?**

B. **WHETHER THE PENNSYLVANIA COURTS AND BOARD ABUSED ITS POWERS AND PLACED AN UNDUE BURDEN UPON THE PETITIONER FOR NOT COMPLYING WITH AUDITS REQUESTS EVEN THOUGH THE SUBSTANTIAL EVIDENCE DEMONSTRATED THAT HE HAD NO NOTICE OF THE REQUESTS?**

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OPINIONS BELOW

The decision of the Supreme Court of Pennsylvania Middle District dated June 21, 2006, is set forth in the Appendix A. The Petitioner's Application for Reconsideration was denied on August 10, 2006 and is set forth in the Appendix B.

The Supreme Court's review was based upon the Commonwealth Court's Opinion of November 14, 2005. (Appendix C). The Commonwealth Court denied the Petitioner's Application for Reargument/Reconsideration on December 30, 2005. (Appendix D). The Bureau of Professional and Occupational Affairs, State Board of Dentistry's decision is attached for reference in Appendix E.

This Writ is timely filed.

STATEMENT OF THE BASIS OF JURISDICTION OF THE SUPREME COURT

The statutory provision for this Court's jurisdiction is 28 U.S.C. Section 1254. The Supreme Court of Pennsylvania issued its Decision in this case on June 21, 2006 and Reconsideration was denied on August 10, 2006. This Petition was timely filed.

CONSTITUTIONAL, STATUTORY AND ORDINANCE PROVISIONS INVOLVED IN THIS CASE

Fourteenth Amendment of the United States Constitution:

The Due Process Clause of the Fourteenth Amendment provides that no State "shall ... deprive any person of life, liberty, or property, without due process of law...."

STATEMENT OF THE CASE

Procedural History

The Bureau of Professional and Occupational Affairs, State Board of Dentistry (hereinafter the "Board") fined the Petitioner for allegedly failing to provide documentation to support his continuing education credit hours during an audit, even though he had no notice of the audits or requests.

The Petitioner appealed the sanctions to the Commonwealth Court of Pennsylvania and filed a brief on August 18, 2004. The Board filed a reply on September 2, 2004.

On November 14, 2005 the Commonwealth Court affirmed the Board's decision.

The Commonwealth Court denied the Petitioner's Application for Reargument/Reconsideration on December 30, 2005. As a result the Petitioner filed a Petition for Relief with the Pennsylvania Supreme Court. The Petition was denied June 21, 2006. The Petitioner's Application for Reconsideration was denied on August 10, 2006.

Thus, the Petitioner seeks relief from this Honorable Court.

Facts

The Petitioner timely filed his license renewal with the required fee to the Board for the two year period of April 1, 1999 through March 31, 2001. In order to maintain his license, the Petitioner was to complete thirty hours of continu-

ing education credits; however, the Petitioner exceeded the minimal requirements and registered forty hours of continuing education credits.

Thereafter, on or about September 10, 2001, the Board of Dentistry decided to audit the Petitioner's continuing education. The Board allegedly sent notice to the Petitioner regarding the first audit via first class mail. Included in the audit was a request to submit a certified copy by October 10, 2001 of the Petitioner's continuing education certificates.

The notice of the audit was not received by the Petitioner, and of course, he did not respond to the request. The Board took no further action and the expiration date expired. Almost a year later, on August 7, 2002, the Board sent a notice for a second audit via certified mail return receipt. The letter was addressed to the Petitioner's residence, not his place of business. The Petitioner was not home at the time of delivery. The postal service returned the second notice to the Board on August 30, 2002 marked "unclaimed".

Several months later, on October 30, 2002, the Petitioner received an order to show cause from the prosecutor of the Commonwealth on behalf of the Board. This was the first time the Petitioner became aware of the audit. The Petitioner immediately contacted the Board and Prosecutor Jarabeck. The latter informed the Petitioner that it was too late and he would be prosecuted for failure to provide documentation of completed continuing education for the period of 1999-2001. By November 19, 2002 the Board had a copy of the Petitioner's continuing education certificates substantiating his thirty hours of education.

The Petitioner discovered that the Board used an incorrect address in its mailings, that is: "Philip J. Taverna D.D.S., 384 Larchmont Way, Mountain Top, Pa 18707". At that time, the Petitioner resided at 2663 Northwood Avenue, in Easton, Pennsylvania. The previous address was never associated in any way with the Petitioner. However, the Board continued to maintain that the Petitioner received actual notice of the audit and he failed to submit the requested documents.

As a result of the Board's determination, they issued a public reprimand on Petitioner's license and imposed a maximum civil penalty of $1,000 alleging that the Petitioner violated §4.1(a)(6) of the Dental Law (Act), 63 P.S. §123.1(a)(6), by reason of his failure to provide a copy of the documentation supporting the completion of the required credit hours of continuing education when requested by the Board under 49 Pa.C.S.A. §33.404.

The Petitioner then sought relief from the Courts. (See Procedural History cited above).

ARGUMENT IN SUPPORT OF WRIT FOR CERTIORARI

A. THE PETITIONER'S CONSTITUTIONAL RIGHTS WERE VIOLATED SINCE HE DID NOT RECEIVE NOTICE IN ACCORDANCE WITH RECENT SUPREME COURT CASES AND HE WAS IMPERMISSIBLY SANCTIONED FOR AN ALLEGED VIOLATION.

Since the decision of *Jones v. Flowers* was not yet determined prior to the Pennsylvania cases decisions, the Petitioner seeks acceptance of this Writ so that the Court may determine whether the *Jones* decision applies to licensing boards and state courts.

The United States Supreme Court in *Jones v. Flowers*, 126 S. Ct. 1708 (2006), held that the government must take additional reasonable steps to provide notice of a tax sale of real property when notice of the sale is mailed to the owner and returned undelivered. The case was an important victory for due process. As is so often true in constitutional cases, the issue before the Court required a balancing of interests: in this case, the government's interest in efficiency and saving money against the individual's interest in receiving adequate notice before losing his or her home. The Court rightly said the government must do more than send a couple of undelivered letters to meet *Mullane's* basic command that there be "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."

The Petitioner suggests that the same standard must also be applied in cases involving licensing boards that are under the umbrella of state jurisdiction. Licensing boards cannot create its own version of due process notice requirements.

The United States Supreme Court in *Jones v. Flowers,* reversed the Arkansas Supreme Court decision in *Jones v. Flowers*, 359 Ark. 443, 2004 WL 2609800 (2004), cert. granted, 126 S. Ct. 35, 162 L. Ed. 2d 933 (U.S. 2005) and rev'd and remanded, 2006 WL 1082955 (U.S. 2006), and held that the government must take additional reasonable steps to provide notice of a tax sale of real property when notice of the sale is mailed to the owner and returned undelivered. The petitioner purchased a house and resided there with his wife until their separation, when he moved elsewhere in the city. After moving, the petitioner failed to notify the property tax collector of his new address. After the mortgage was paid off, the property taxes went unpaid, and the property was certified as delinquent. In an attempt to notify the petitioner that the property would be subject to tax sale in two years unless redeemed, the state sent a certified letter to the property's address, which was returned unclaimed. Two years later, the state published a notice of public sale, and after negotiating a private sale when no bids were received, mailed another certified letter to the address, which was also returned unclaimed.

The Arkansas courts rejected the petitioner's claim that the Commissioner of State Lands had failed to provide adequate notice, finding that the notice provisions of the Arkansas tax sale statute comported with due process. Writing for the Supreme Court, Chief Justice Roberts in an opinion joined by

three other members of the Court held that when a mailed notice of tax sale is returned unclaimed, the state must take additional reasonable steps in an attempt to provide notice before selling the property, if it is practicable to do so. The Chief Justice noted that, since *Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950)*, the Supreme Court has held that notice is constitutionally sufficient if reasonably calculated to reach the intended recipient when mailed, but the Court had never addressed whether due process requires further efforts when the state becomes aware prior to the taking that the attempt to provide notice has failed. Most courts that have addressed the latter issue have found that the state must do more. Under *Mullane*, the means chosen to provide notice must be "such as one desirous of actually informing the absentee might reasonably adopt to accomplish it."

The adequacy of the particular form of notice is judged under a balancing test that weighs the state's interest against that of the individual interest protected by the Fourteenth Amendment, the Chief Justice said. In the case at bar, the state may have made a reasonable initial calculation of how to reach the petitioner. Given that an individual was unlikely to do nothing when faced with the prospect of losing his home, however, the state had reason to suspect after the certified mail was returned unclaimed that the petitioner was no better off than had no notice had been sent. The Chief Justice rejected the dissent's dismissal of the state's knowledge that its notice was ineffective as "learned long after the fact." The notice letter, the Chief Justice noted, was promptly returned to the state two to three weeks after it was sent, and the Ar-

kansas statutory regime precluded the state from taking the property for two years during the period in which the property owner could exercise a right to redeem. The government must consider unique information about an intended recipient regardless of whether the statutory scheme is reasonably calculated to provide notice in the ordinary case. Because the state's chosen procedure promptly provided additional information about the effectiveness of the notice, it did not contravene the principle that the constitutionality of notice is judged ex ante to consider what the state did with that information. Nor was the state relieved of its constitutional obligation to provide notice by the property owner's failure to meet his legal obligation to keep his address updated or his obligation to ensure that those occupying the property would alert him if it was in jeopardy. Because additional reasonable steps were available to the state, the Commissioner's efforts were insufficient to satisfy due process. What is reasonable in response to new information is dependent upon what the new information reveals. The court made several suggestions. The return of the mail as unclaimed suggested that the owner was not home when the mailman attempted delivery and did not attempt to claim the letter at the post office or that the owner no longer resided at the address. In the first scenario, the state might have reasonably attempted to resend the notice by regular mail, increasing the chances of actual notice. Other possibilities were to post notice on the home or to address otherwise undeliverable mail to "occupant." The state was not required to search the local phone book and other records for alternative addresses for the owner, as that would impose significantly greater burdens than other easier options. The Court would not prescribe a form of service;

however, as the state might best determine how to proceed. *Id.*

The Petitioner argues that he submitted substantial evidence to support his position that he did not receive notices of the audits of his renewal license. The alleged first audit notice expired. The notice of the second audit was never received. By not receiving notice and having an unwarranted fine, public reprimand, name and reputation at risk, the Petitioner was severely prejudiced and his constitutional rights were violated. The Petitioner was subjected to the maximum fine of the Board even though the issue did not surround the treatment of his patients or a consumer complaint, but documents to support an audit. In fact, the documents proved that the Petitioner surpassed the minimum continuing education requirement.

Furthermore, the holding in Jones v. Flowers and its interpretation have already been upheld and extended. See *Estate of Lowe ex rel. Harris v. Apex Tax Investments*, Inc., 126 S.Ct. 2287, 74 USLW 3437 (May 22, 2006); *U.S. v. Williams*, 2006 WL 1582152 (M.D.Fla., June 2, 2006) (using the *Jones v. Flowers* holding in a forfeiture determination case, the District Court held that notice using certified mail to the complainant's residence, to her attorney, and to her business were taken as a whole was reasonably calculated to inform the complainant of the pending forfeiture proceedings met the *Jones v. Flowers* due process standard); *Equity One, Inc. v. City of Pittsburgh*, 2006 WL 1509334 (W.D.Pa) (the District Court of Pennsylvania extended the *Jones v. Flowers* holding to a claim under the Civil Rights Act of 42 U.S.C. §1983 where a mortgagee had to comply with notice re-

quirement prior to condemnation or demolition proceedings); *Conseco Finance Servicing Corp. v. Missouri Dep't of Revenue*, 195 S.W.3d 410 (2006); *Sidun v. Wayne County Treasurer*, 2006 WL 2355506.

Given the clarification of the notice requirements mandated under the recent Supreme Court decision as well as its extension to other cases, the same requirements must be upheld and extended for administrative agencies working under the realm of the Commonwealth.

To deny the Petitioner the opportunity to present his appeal on the merits would be a denial of his due process rights. Substantial evidence supports the Petitioner's allegations that his appeal must be addressed on the merits and not dismissed. The term "substantial evidence" is defined as such relevant evidence as reasonable minds might accept as adequate to support a conclusion. *Yuhas v. W.C.A.B. (City of Pittsburgh),* 82 Pa.Cmwlth. 390, 476 A.2d 1377 (1984). There is substantial evidence that the Petitioner did not receive adequate notice under the facts and circumstances. The Board erroneously imposed sanctions and caused damage to name and professional reputation upon the Petitioner after he submitted credible evidence that he did not receive the notice of the first audit which then later expired. When the Petitioner received the order to show cause by the Board, he submitted sufficient documentation that exceeded the minimum requirements. Even though he met his license requirements, the Petitioner was sanctioned for not responding to a notice he never received. The Board exceeded its purpose and powers by imposing such a violation thereby violating the Petitioner's due process rights.

Instead, he provided documents to support his continuing education upon receipt of the order to show cause. The Petitioner contacted the Board as soon as he was made aware of the audit which was not until October 30, 2002. The Board instructed the Petitioner to contact the Prosecutor Jarabeck. However, the Prosecutor said too late without asking to see the supporting documentation as was requested in the audit notice. In two weeks, the Board had copies of the Petitioner's certificates substantiating his education hours. However, the Board acted punitive in nature and attacked the Petitioner for failing to produce documents for an audit that he had no notice of.

The substantial evidence as cited in the facts above suggests that the Board used the incorrect address and that he did not receive any notice of the audit. The notice of the first audit expired since it was never received and the Board never took further action. The notice of the second audit over a year later was sent via certified mail but was returned as "unclaimed". When the Petitioner subsequently had knowledge, he complied by gathering and providing the Continuing education credit certificates. The Petitioner would not jeopardize his license, name, and professional reputation and be subject to disciplinary action by other licensing authorities in other states by intentionally failing to provide documentation when he exceeded the minimum requirements.

Applying the facts in the present case to the recent Supreme Court case *Jones*, this Honorable Court must follow the steps of the District Court of Pennsylvania and extend the *Jones* case to administrative proceedings and state court

cases. There was no notice of either the first or second audits. But if there was any evidence of notice and the mailbox rule was applied, the Petitioner met his burden to overcome the presumption.

By abusing its power and failing to evaluate the substantial evidence using the correct standards, the Petitioner's constitutional rights were violated. The Fourteenth Amendment of the United States and Pennsylvania constitutions make it explicitly clear that: "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." *See In re Upset Sale, Tax Claim Bureau of Berks County*, 505 Pa. 327, 479 A.2d 940, 953 (1984); *Glen Rock Borough v. Miller*, 720 A.2d 800 (1998). The Petitioner's protected interest in his dentistry license, name and professional reputation were sanctioned without proper notice. Furthermore, the Petitioner was subject to investigation and possible penalty and expense by other dental boards because of this sanction. Also, he was subject to suspension and revocation of his license. The Board's lack of notice and care, and insufficient responsibility of notice did not reach a threshold to allow for excessive penalties.

If the Petitioner had notice he would have complied since his renewal did not contain any false information. Moreover, the punishment of $1,000.00 which is the maximum allowed by statute plus a public reprimand was too severe and unjustifiable. 49 PC §33.4.4(f). The punishment would have been the same if the Petitioner had not acquired any continuing

education credit certificates which is unfair and unreasonable. An unreasonable burden of proof that the Petitioner did not receive the notice for the first audit was applied, and thus, he was wrongfully sanctioned. *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 195, 103 S.Ct. 2706, 2709, 77 L.Ed.2d 180 (1982); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S.Ct. 652, 657, 94 L.Ed. 865 (1950); Supreme Court's Construction of Due Process: 77 L.Ed.2d. 1485 (1999). Furthermore, the Board and lower court acknowledged that the Petitioner met his license requirements, and in fact, exceeded the minimum requirements. By not receiving notice, the Petitioner's unblemished record as a dentist and commendable standing in the professional community have been tampered with. His property of his reputation and license were wrongfully impeded without any due process of notice and opportunity to be heard.

Moreover, not only did the Petitioner not receive the notice for the first audit that was allegedly sent via first class mail, the Board failed to pursue any course of action against the Petitioner for a non-response for almost a year. A notice for a second audit was allegedly sent via certified mail that was returned unclaimed. The Board and lower courts should have not applied the mailbox rule, because there was no evidence of actual notice. But even if there was any evidence of notice, the Petitioner met his burden of rebuttable presumption necessary to overcome the mailbox rule. The mailbox rule provides that proof of a mailing raises a rebuttable presumption that the mailed item was received. *Samaras v. Hartwick*, 698 A.2d 71, 73 (Pa.Super.1997); *Donegal Mutual Insurance Co. v. Insurance Department*, 719 A.2d 825 (Pa.

Commw. 1998). Furthermore, the presumption under the mailbox rule is not nullified solely by testimony denying receipt of the item mailed. *Id.; see also Donegal Mutual Insurance Company v. Insurance Department,* 719 A.2d 825 (Pa.Cmwlth.1998) (finding that merely asserting that the letter was not received, without corroboration, is insufficient to overcome the presumption of receipt); *Breza v. Don Farr Moving & Storage Company*, 828 A.2d 1131 (2003); *Donegal Mutual Insurance Co. v, Insurance Department*, 719 A.2d 825 (1998). But, in our facts, the Petitioner submitted substantial and credible evidence to support his denial of the receipt of the notice of the first audit. The first audit notice expired approximately a month after it was sent, and the Board failed to act thereafter, that is it did not allege that it sent another notice immediately thereafter or file any sort of complaint with the attorney general's office. The Board's silence as the Petitioner's alleged failure to respond must be considered sufficient evidence that notice was not received. Thus, the Board and the Attorney General must be prevented to argue that it satisfied the notice requirement. The Petitioner never received notice of the first audit and submitted sufficient evidence to overcome the rebuttable presumption, that is, the Board's failure to act upon the alleged failure to respond to the audit request. To suggest that the Petitioner needed more to overcome the rebuttable presumption was a violation of due process as well as a clear abuse of discretion.

The court in *Warenczuk v. PennDOT*, 9 Pa. D. & C.4th 417, 419-420, 1991 Pa. D. & C. LEXIS 424 (1991), addressing a driver license suspension, warned "[t]he continuing re-

fusal of the Department of Transportation to send notices of license suspensions by certified mail, or some other means where there is proof of receipt, cause recurring dilemmas for trial courts." That court quoted *Commonwealth v. Gray*, 356 Pa. Super. 299, 514 A.2d 621 (1986), which warned: "It is our concern in these cases that a driver convicted of driving while his license is suspended had actual notice of the suspension. We are concerned with the reliability of notice by mail as there generally is not proof of actual receipt. It is curious that the bureau does not send a notice as important as a notice of suspension of driving privileges by certified or registered mail, where a return receipt can be used to show actual notice." As the court in *Warenczuk* pointed out in a subsequent case, the Superior Court, continued to be perturbed by the department's failure to utilize a more reliable method of providing notice, reversed a summary criminal conviction for failure to prove notice beyond a reasonable doubt. *Commonwealth v. Taylor*, 390 Pa. Super. 571, 568 A.2d 1320 (1990). The court in *Warenczuk* also noted that there was "no statutory requirements for the department to send their notices by certified or other mail evidencing receipt" but emphasized that "enforcing the due-process requirements of the 14th Amendment is the province of the courts and not the legislature." *Id.* at 421. Given these holdings, the Board must be estopped from suggesting that the first notice was received. As cited above, the Board failed to comply with the mailbox rule. The Petitioner met his rebuttable presumption that the mailed item was not received. *Samaras, supra*; *Donegal Mutual, supra*. The Petitioner met the burden by proving that the Board failed to pursue any course of action against the Petitioner for a non-response for

almost a year thereby evidencing the non-receipt of the notice of the first audit. The notice of the first audit expired approximately a month after it was sent, and the Board failed to act thereafter, that is it did not allege that it sent another notice immediately thereafter or file any sort of complaint with the attorney general's office. In violation of his due process, the Petitioner did not receive notice. The Board's silence as the Petitioner's alleged failure to respond must be considered sufficient evidence that notice was not received. Viewing the evidence in its totality, the Petitioner met his burden that his statement of non-receipt coupled with the Board's failure to act for almost a year was sufficient to overcome the mailbox rule. *See Donegal Mutual, supra; Breza, supra.* The Petitioner suggests that the state courts improperly applied the mailbox case.

There was no evidence that the notice for the first audit was sent to the Petitioner, especially since it expired. With respect to the alleged notice of the first audit, there is no evidence that notice was even sent. The state courts applied the mailbox rule without any evidence of any mailing, especially, as stated above an improper address was used that was unrelated to the Petitioner.

The Board and lower courts erroneously applied the mailbox rule. The Board did not meet its burden of proof. The lower courts erroneously applied the mailbox rule and erred in its application; with the applicable facts, no reasonable conclusion without any doubt could be shown to prove that the Petitioner received notice. On the contrary, the evidence only suggested that notice was not sent and not received by Petitioner or any representative or relative of his. The lower

courts and Board erred in applying the underlying test and citing cases where there was a track of notices sent. There is no direct or indirect evidence that the Petitioner had notice or that the mailbox rule should have even been triggered. Without notice the Petitioner was fined and sanctioned in violation of his due process.

Of course, even if this Court determined that the notice of the second audit was sent via certified mail, the Petitioner never claimed the notice and thus he once again overcame the rebuttable presumption. There was no notice and to pursue a complaint against the Petitioner was a violation of his due process. This Honorable Court must extend the due process notice requirements as well as applicable case law to determine if any notice in light of all the circumstances was actually tendered. The Petitioner suggests that no proper notice was made. Even if there was an "alleged notice", the Petitioner met his rebuttable presumption that he did not receive it.

But still, in light of all the compelling evidence of non-receipt of any notice, the Board usurped its function and still imposed a sanction for improper documentation when the Petitioner submitted substantial evidence that he did not receive the original audit notice and that he submitted all documentation when he was notified. The Board should be estopped from exceeding its power and imposing sanctions that were not supported by the evidence. *See Central Electric Cooperative, Inc. v. Pennsylvania Public Utility Commission,* 111 Pa.Cmwlth. 223, 533 A.2d 1084 (1987) and *Kentucky Fried Chicken of Altoona v. Unemployment Compensation Board of Review,* 10 Pa.Cmwlth. 90, 309 A.2d 165

(1973). As our Supreme Court stated in relevant part in *Pennsylvania Human Relations Commission v. St. Joe Minerals Corp.*, 476 Pa. 302, 310, 382 A.2d 731, 736 (1978), "[o]nly those powers within the legislative grant *either express or necessarily implied,* can be exercised by the administrative body." (Emphasis added). The Board exceeded its authorities, beyond any powers granted by the legislature. Not only did the Board fail to provide proper notice, it punished the Petitioner beyond the scope of its authority.

To determine whether a fine is excessive and a violation of the constitution, a court must consider whether the statutory provision imposes punishment and, if so, whether the fine is excessive. U.S.C.A. Const.Amend. 8. The Eighth Amendment provides that excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted. *Id.* It is made applicable to the states through the Fourteenth Amendment. U.S. CONST. Amend. XIV §1. Article I, Section 13 of the Pennsylvania Constitution is coextensive with the Eighth Amendment and provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel punishments inflicted." PA. CONST. Art. 1 §13. In our facts, the sanction imposed was excessive given that it was imposed not due to negligence or a patient complaint, but a failure to attach documents to an audit that he had no notice of.

The Petitioner did not have means or opportunity to know that there were requests for the audits. It is unreasonable that a dignified and well-respected dentist would intentionally violate an audit knowing that he met the requirements to maintain his professional license. The Board's decision was

an abuse of process and not in spirit of the legislature's intent in creating such a Board.

Since the Board abused its power and violated the notice requirements, this writ must be granted. See *City of Pittsburgh Commission of Human Relations v. U.S. Steel Corp.*, 127 Pa.Cmwlth. 646, 562 A.2d 940 (1989), *petition for allowance of appeal denied,* 524 Pa. 631, 574 A.2d 72 (1990).

Furthermore, the Petitioner requests that this Court extend the holding of *Jones v. Flowers* to state and administrative bodies. Every agency and court must enforce the due process requirements in a similar manner.

B. THE LOWER COURTS AND BOARD ABUSED ITS POWERS AND PLACED AN UNDUE BURDEN UPON THE PETITIONER FOR NOT COMPLYING WITH THE AUDITS REQUESTS EVEN THOUGH THE SUBSTANTIAL EVIDENCE DEMONSTRATED THAT HE HAD NO NOTICE OF THE REQUESTS RESULTING IN AN ABUSE OF PROCESS.

The Petitioner suggests that agencies must not only comply with the notice requirements as established in court cases but also act within its limited scope. To do otherwise constitutes an abuse of process. The courts must narrowly construe the role of licensing boards as well as their power. In our case, the Board was able to abuse its power and fine the Petitioner without justification.

The Board erroneously imposed sanctions upon the Petitioner after he submitted credible evidence that he did not receive the notice for the first audit, but when he received the order to show cause by the Board, he submitted sufficient documentation that exceeded the minimum requirements. Even though he met his license requirements, the Petitioner was sanctioned for not responding to a notice he never received. The Board exceeded its purpose and powers by imposing such a violation thereby violating the Petitioner's due process rights.

The Petitioner met his burden of proof that the decisions below violated his constitutional rights and the findings of fact were not supported by substantial evidence. *Slawek v. State Board of Medical Education and Licensure, 526 Pa. 316, 586 A.2d 362 (1991)*; *Crooks v. Pennsylvania Securities Comm'n*, 706 A.2d 360 (1998).

On appeal the Pennsylvania's courts were obliged to affirm the agency's adjudication unless the Court finds that it violated constitutional rights, was contrary to law, or was based on findings of fact which are not supported by substantial evidence. *Harmony Volunteer Fire Company and Relief Association v. Pennsylvania Human Relations Commission, 73 Pa.Cmwlth. 596, 459 A.2d 439 (1983)*. Substantial evidence is that evidence which a reasonable person might accept as adequate to support the conclusion reached. *A.P. Weaver and Sons v. Sanitary Water Board, 3 Pa.Cmwlth. 499, 284 A.2d 515 (1971)*.

Substantial evidence suggests that the Petitioner's constitutional rights were violated. Not only did he not receive

notice, his property, that is, his professional reputation as a dentist and status in the professional community, have been severely prejudiced without recourse and without due process. This Honorable Court has held continuously that a professional reputation constitutes property, and thus, the Petitioner's rights under the Constitution must be followed so not to infringe upon the protected interest of a license. See *Connecticut v. Gabber*, 526 U.S. 286, 119 S.Ct. 1292 (1999) (in dicta, the Court state that evidence of income, reputation, clientele, or professional qualifications being adversely affected were proof of violations of Fourteenth Amendment constitutional rights; *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 110 S.Ct. 2447 (1990) (a lawyer's most precious asset is their professional reputation); *Spevack v. Klein,* 385 U.S. 511, 87 S.Ct. 625, 17 L.Ed.2d 574 (1967) ("[T]hreat of disbarment and the loss of professional standing, professional reputation, and of livelihood are powerful forms of compulsion"). The Board and the lower court failed to analyze the protected property interest that the Petitioner held in his license. The Petitioner's protected property interest in his reputation deserved the same due process notice as the tax sale in *Jones v. Flowers, supra*. By not giving proper notice and ruining the Petitioner's impeccable record as a dentist and stature in his professional community, his due process rights were clearly violated. There was no logical explanation of the Board's argument within the record to justify no mailing or notices and then impede upon his reputation.

In determining whether the findings of an administrative tribunal are supported by substantial evidence, the court re-

views the entire record in the light most favorable to the prevailing party, giving that party the benefit of all inferences which logically and reasonably can be drawn from the record. *Lewis v. Civil Service Com'n, City of Philadelphia, 518 Pa. 170, 542 A.2d 519 (1988); Mormak v. Unemployment Compensation Bd. of Review, 135 Pa. Cmwlth. 232, 579 A.2d 1383 (1990).* The reviewing court neither reweighs the testimony of contradicting witnesses, nor resolves the issue of which witnesses were more credible. *Robinson v. W.C.A.B. (Lindsey), 139 Pa. Cmwlth. 82, 589 A.2d 778 (1991).*

The presence of inconsistencies or conflicts in the evidence does not necessarily mean that substantial evidence supporting the agency's findings does or does not exist. *Ciavarelli v. Com., State Bd. of Funeral Directors, 129 Pa.Cmwlth. 305, 565 A.2d 520 (1989); Ryan v. Com., Unemployment Compensation Bd. of Review, 120 Pa.Cmwlth. 80, 547 A.2d 1283 (1988).* Where conflicting proof would sustain a finding either way on an issue, the court will not disturb such finding. *Ferrari v. Pennsylvania Public Utility Commission, 163 Pa. Super. 24, 60 A.2d 602 (1948).*

Only testimony which is so uncertain, inadequate, equivocal, ambiguous, or contradictory, as to make administrative findings of fact mere conjecture, fails to meet the test of substantiality in administrative proceedings. *D & T Brooks, Inc. v. Workmen's Compensation Appeal Bd., 38 Pa. Cmwlth. 223, 392 A.2d 895 (1978).* When the court believes that the tribunal or hearing officer has misconstrued the evidence, however, the court must find that the evidence does not sup-

port the findings. *Robinson v. W.C.A.B. (Lindsey), 139 Pa.Cmwlth. 82, 589 A.2d 778 (1991).*

In our facts, the Petitioner met his burden of proof that not only did he not receive notices as required to meet due process but that the Board abused its power by broadening the types of cases, violations and sanctions it could issue. If licensing boards are given such a broad perspective as well as change the notice requirements without a narrow review by courts, then any profession requiring licensing will be affected. Moreover, by attacking his license, the Petitioner's reputation, a protected property interest, has been severely prejudiced.

The purpose of the audits was to verify that the Petitioner after renewing his license did in fact fulfill the continuing education requirements. The Petitioner contends that he did not mislead or act willful in any manner in reporting and documenting his continuing education. Under 49 P.S. §33.212, conduct that would be considered misleading would be deceptive, untrue and fraudulent representations. There is no evidence that the Petitioner misrepresented any of the facts or concealed facts. Id.

Instead, he provided documents to support his continuing education upon notice of the request. The Petitioner contacted the Board as soon as he was made aware of the audit which was not until October 30, 2002. The Board instructed the Petitioner to contact the Prosecutor Jarabeck. However, the Prosecutor said too late without asking to see the supporting documentation as was requested in the audit notice. In two weeks, the Board had copies of the Petitioner's cer-

tificates substantiating his education hours. However, the Board acted punitive in nature and attacked the Petitioner for failing to produce documents for an audit that he had no notice of.

The substantial evidence as cited in the facts above suggests that the Board used the incorrect address and that he did not receive any notice of the audit. The certified mail was returned as "unclaimed". When he had notice, he complied by gathering and providing the continuing education credit certificates.

By imposing a fine and public reprimand, the Board and lower courts placed an undue burden upon the Petitioner to overcome. The Petitioner submitted substantial evidence that he did not have notices of the audits. To determine otherwise is an undue burden upon the Petitioner and contrary to the cases cited herein.

Therefore, the Petitioner respectfully requests that the decisions below be vacated.

CONCLUSION

The Supreme Court of Pennsylvania has placed a high burden of proof upon the Petitioner to overcome the notice requirement in violation of recent Supreme Court case as well as the due process clause of the United States Constitution. Furthermore, a licensing board exceeded its authority suggesting that it may create its own notice standards. The Court should grant *certiorari* to review these important matters, order a proper remedy for the Petitioner, vacate the Pennsylvania Supreme Court's decision or remand the case to the Pennsylvania Supreme Court so that a decision may be rendered as to whether the notice met the *Jones v. Flowers* requirement.

Respectfully Submitted:

Philip J. Taverna, D.D.S.
Pro Se

APPENDIX

APPENDIX A – ORDER DATED AUGUST 10, 2006

IN THE SUPREME COURT OF PENNSYLVANIA MIDDLE DISTRICT

Philip J. Taverna, D.D.S,	:	No. 69 MAL 2006
Petitioner	:	
v.	:	Petition for Allowance
	:	of Appeal from the
Bureau of Professional and	:	Order of the
Occupational Affairs, State	:	Commonwealth Court
Board of Dentistry,	:	
Respondent	:	

ORDER

PER CURIAM

AND NOW, this 10th day of August, 2006, the Application for Reconsideration is hereby DENIED.

APPENDIX B – ORDER DATED DECEMBER 30, 2005

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Philip J. Taverna, D.D.S.	:	No. 1081 CD 2005
Petitioner,	:	
v.	:	
Bureau of Professional and	:	
Occupational Affairs, State	:	
Board of Dentistry,	:	
Respondent.		

ORDER

NOW, December 30, 2005, having considered petitioner's application for reargument/reconsideration, and respondent's answer, the application is denied.

BY THE COURT:

_____

James Gardner Colins
President Judge

APPENDIX C – MEMORANDUM OPINION, FILED NOVEMBER 14, 2005

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Philip J. Taverna, D.D.S.	:	No. 1081 CD 2005
Petitioner,	:	
v.	:	Submitted: Sept. 30, 2005
Bureau of Professional and	:	
Occupational Affairs, State	:	
Board of Dentistry,	:	
Respondent.		

BEFORE: Honorable Dan Pellegrini, Judge
Honorable Renee Cohn Jubelirer, Judge
Honorable Robert Simpson, Judge

OPINION NOT REPORTED

MEMORANDUM OPINION
BY JUDGE SIMPSON FILED: November 14, 2005

Philip J. Taverna, D.D.S. (Dentist), representing himself, petitions for review of an order of the State Board of Dentistry (Board), which adopted the determination of the hearing examiner imposing a public reprimand and a $1,000.00 fine for his failure to comply with a continuing education credit audit. We affirm.

In March 2001, Dentist, who is licensed to practice dentistry in the Commonwealth but does not actively do so, filed a biennial license renewal application with the Board. On

the application, Dentist indicated he complete at least 30 credit hours of continuing education in acceptable courses within the time period specified. Based on the information Dentist presented in his renewal application, the Board renewed his license.

In September 2001, the Board sent a notice by first class mail informing Dentist he was randomly selected for an audit of his continuing credits. As Dentist was not actively practicing dentistry under his Pennsylvania license at the time of the notice,[1] the address on file with the Board, 2663 Northwood Avenue, Easton, Pennsylvania, 18042, is his residence. The notice was sent to this address.

The notice required Dentist to return the audit form along with photocopies of certificates of attendance verifying completion of at least 30 hours of continuing education credits. In addition, the notice explained that failure to comply with the audit may result in disciplinary action. Dentist never responded to the notice.

Approximately eleven months later, the Board sent to Dentist at his address of record a final audit notice by certified mail, return receipt requested. The final audit notice again requested copies of his certificates of attendance. The notice also informed Dentist that failure to comply with the audit request may result in disciplinary action by the Board.

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[1] Dentist also holds a license to practice dentistry in New Jersey.

After unsuccessfully delivering the final audit twice, the United States Post Office returned it as "unclaimed."

Shortly thereafter, the Commonwealth filed an order to show cause alleging Dentist violated the Dental Law (Law)[2] by failing to comply with the Board's regulation concerning the reporting of continuing education credits at 49 Pa. Code § 33.404(b).[3] Dentist filed an answer asserting he never received notice of the audit. In response, the Commonwealth filed an amended order to show cause alleging the same violation, and included copies of the audit notices. When Dentist answered, denying receipt of the audit notices a second time, the Board assigned the matter to a hearing examiner.

Before the hearing examiner, the Commonwealth presented the amended order to show cause with the audit notices, Dentist's answer, and certified record from the Board relating to Dentist's licensure status and continuing education audit. Dentist failed to appear at the hearing. Instead, he sent a letter with attachments documenting completion of 34 continuing credit hours during the time in questions.

The hearing examiner subsequently issued a proposed adjudication and order, determining the Board mailed two audit

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[2] Act of May 1, 1993, P.L. 216, as amended, 63 P.S. §§120-130i.

[3] That Section provides, "[an] applicant [for license renewal] shall provide a copy of the documentation supporting the completion of the required credit hours when requested to do so by the Board." 49 Pa.Code § 33.404(b). The Board's regulation further provides, "[the][f]ailure to comply with subsection (b) may result in disciplinary or corrective action." 49 Pa. Code §33.404(f).

notices to Dentist, but Dentist failed to provide documentation evidencing completion of the requisite continuing education credit hours. The hearing examiner concluded Dentist violated the Board's regulation concerning the reporting of continuing education credits, and recommended a $1,000.00 civil penalty and a public reprimand.

Thereafter, the Board issued a notice of intent to review the proposed adjudication, and informed Dentist of his ability to submit further argument on the proposed sanction. Dentist filed a "Response: Proposed Adjudication and Order, "arguing he never received notice of the audit. Following a review of the record and Dentist's exceptions, the Board issued a final order adopting the hearing examiner's proposed adjudication and order. Dentist appealed to this Court.[4]

On appeal, Dentist argues the Board erred by imposing disciplinary action against his license because: he never received notice of the audit; the sanctions imposed are unduly harsh; and, he completed the requisite continuing education credit hours for renewal of his license.[5]

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[4] Our review is limited to determining whether constitutional rights were violated, whether the decision is in accordance with the law, and whether necessary findings are supported by substantial evidence. Oppenheim v. State Dental Council and Examining Bd., 459 A.2d 1308 (Pa. Cmwlth. 1983).

[5] Additionally, the Board filed a motion to strike portions of Dentist's brief and reproduced record which references an offer of settlement tendered by the Board. As the Board did not admit the offer of settlement into evidence, and it is not part of the certified

Dentist first contends the board erred in determining he violated 49 Pa. Code § 33.404(b) because he never received notice of the audit. He also argues the Board's finding that the Commonwealth actually mailed the September 10, 2001 audit notice is not supported by substantial evidence. We disagree.

Under the mailbox rule, a properly addressed and mailed letter raises a rebuttable presumption that the item was, in fact, received. J.A. v. Dep't of Pub. Welfare, 873 A.2d 782 (Pa.Cmwlth. 2005). Moreover, the mere denial of receipt is insufficient to rebut this presumption. Id. The question of whether an individual item was actually mailed is purely a factual question. Paul v. Dwyer, 410 Pa. 229, 188 A.2d 753 (1963).

The Board is ultimate finder of fact. Oppenheim v. State Dental Council and Examining Bd., 459 A.2d 1308 (Pa. Cmwlth. 1983). Where the Board's findings are supported by substantial evidence, they are binding on appeal. See Mostatab v. State Bd. of Dentistry, 881 A.2d 1271 (Pa. Cmwlth. 2005). Substantial evidence is defined as such evidence as a reasonable mind might accept as adequate to support a conclusion. Ryan v. Workmen's Comp. Appeal Bd. (Cmty. Health Servs.), 550 Pa. 550, 707 A.2d 1130 (1998).

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record, we grant the Board's motion. See Pa.R.A.P. 1921; Kochan v. Dep't of Transp., Bureau of Driver Licensing, 768 A.2d 1186 (Pa. Cmwlth. 2001) (only items which are part of the certified record may be considered on appeal). See also Pa. R.E. 408 (offers of compromise are not admissible).

Here, the Board determined, "[on] September 10, 2001, the Board sent [Dentist] a continuing education audit notice directing him to 'submit photocopies of certificates of attendance verifying completion of at least 30 hours of continuing education' for the 1999-2001 renewal period." Proposed Adj. and Order, Finding of Fact No. 5. In making this determination, the Board credited the Commonwealth's evidence, including a copy of the September 10, 2001 audit notice from its official file and attestation under seal of Lisa M. Burns, the Board's Administrator, who stated the Board mailed, via first class mail, the September 10, 2001 audit notice to Dentist. Commonwealth Exs. C-1 and C-3.

42 Pa.C.S. § 6104 provides that government records under seal of the custodian "shall be admissible as evidence that the governmental action or inaction disclosed therein was in fact taken or omitted." See Shapiro v. State Bd. of Accountancy, 856 A.2d 864 (Pa. Cmwlth. 2004). As such, we conclude the Board's determination that the Commonwealth properly provided notice of the audit is supported by substantial evidence, and we will not disturb it. See Mostatab.

As the Board's finding is sufficient to raise the presumption of receipt, the burden of proof shifted to Dentist to rebut it. Here, however, Dentist failed to produce credible evidence to rebut the presumption. More specifically, Dentist failed to challenge the accuracy or validity of address to which the Board mailed the notice.[6] Rather, Dentist simply

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[6] The Board also noted that Dentist received all of the pleadings filed in this matter, which are mailed to the same address the audit notices were originally mailed. Final Adjudication and Order at 4.

asserted a general denial of receipt in the letter he mailed to the Board.[7]

Upon review, the Board determined Dentist's denial, "[does] not constitute evidence, [is] not deemed credible, and [is] given no weight whatsoever." Proposed Adj. and Order at 9. Thus, Dentist failed to present credible evidence to rebut the presumption of receipt, and Dentist's argument fails.

Dentist also contents the Board acted unreasonably by imposing the unduly harsh and unwarranted sanctions of a public reprimand and a fine in the amount of $1,000.00. Again, we disagree.

The Law authorizes the Board to impose sanctions for violating any of its provisions or of a lawful regulation promulgated by the Board. Section 4.1.(a)(6) of the Law.[8] As such, when the Board determines a violation occurred, it is free to impose a public reprimand under Section 4.1.(b)(2), and a civil fine of up to $1,000.00 under Section 10.1 of the Law.[9]

Contrary to Dentist's assertion, our review of the Board's action is not whether its order was reasonable, but whether it was made in accordance with law. Lajevic v. Dep't of State,

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[7] Additionally, in his letter to the Board, Dentist stated, "I do not accept certified mail." Commonwealth Ex. C-2.

[8] Added by Act of Dec. 20, 1985, P.L. 513, as amended, 63 P.S. §123.2.

[9] Added by Act of Dec. 20. 1985, P.L. 513, as amended, 63 P.S. §129.1.

Bureau of Prof'l and Occupational Affairs, 645 A.2d 348 (Pa. Cwmlth. 1994). In the absence of bad faith, fraud, or capricious action, this Court may not substitute its judgment for the Board's as to the appropriateness of the sanction. Id. See also Slawek v. State Bd. of Educ. & Licensure, 526 Pa. 316, 586 A.2d 362 (1991).

Here, because the Board acted within its statutory authority to impose a $1,000.00 fine and a public reprimand, and because there is nothing in the record indicating penalties were motivated by anything other than the Board's sound discretion, we discern no error.

Lastly, Dentist maintains the Board erred in imposing sanctions against his license because he completed the requisite continuing education credit hours for the renewal of his professional license. This argument lacks merit.

The Board charged Dentist with violating its regulation concerning the reporting of continuing education credit hours, not with a failure to complete the credit hours. Thus, completion of the requisite continuing education credit hours is irrelevant. Because the Board's determination that Dentist failed to comply with the Board's audit is supported by substantial evidence and is in accordance with the Law, we conclude the Board did not err in imposing sanctions against Dentist's professional license.[10]

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[10] In his petition for review, Dentist also asserts the Board's findings and conclusions are contrary to the evidence and are not supported by substantial evidence. However, in his brief to this Court, Dentist fails to identify which findings and conclusions are

Based on the foregoing, we affirm.

ROBERT SIMPSON, Judge

in error or develop the arguments in any meaningful manner. Therefore, these general assertions are deemed waived. See Browne v. Commonwealth, 843 A.2d 429 (Pa.Cmwlth.), petition for allowance of appeal denied, ___Pa.___, 863 A.2d 1149 (2004) (party's failure to include analysis and relevant authority results in waiver of issue).

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

Philip J. Taverna, D.D.S.	:	No. 1081 CD 2005
Petitioner,	:	
v.	:	
Bureau of Professional and	:	
Occupational Affairs, State	:	
Board of Dentistry,	:	
Respondent.		

ORDER

AND NOW, this 14th day of November, 2005, the order of the Bureau of Professional and Occupational Affairs, State Board of Dentistry is hereby AFFIRMED and the Board's Motion to Strike is hereby GRANTED.

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ROBERT SIMPSON, Judge

APPENDIX D – FINAL ADJUDICATION AND ORDER, DATED APRIL 26, 2005

BEFORE THE STATE BOARD OF DENTISTRY

COMMONWEALTH OF PENNSYLVANIA
BUREAU OF PROFESSIONAL AND OCCUPATIONAL AFFAIRS

v.

PHILIP J. TAVERNA, D.D.S.

DOCKET NO. 1371-46-02

FILE NO. 02-46-04951

FINAL ADJUDICATION AND ORDER

BASIL L. MERENDA, COMMISSIONER
BUREAU OF PROFESSIONAL AND
OCCUPATIONAL AFFAIRS

VEASLEY B. CULLEN, JR., D.M.D.
CHAIRMAN
STATE BOARD OF DENTISTRY

2601 N Third Street
Post Office Box 2649
Harrisburg, PA 17105-2649

HISTORY, FINDINGS OF FACTS, CONCLUSIONS OF LAW AND DISCUSSION

The Board adopts the history, findings of facts, conclusions of law and discussion of the hearing examiner's proposed adjudication and order, issued August 9, 2004, a copy of which is attached hereto (Attachment A), and adds the following discussion:

After the hearing examiner issued the proposed adjudication and order, the Board issued a notice of intent to review the proposed adjudication and order on August 13, 2004. On August 18, 2004, Respondent filed a "Response" to the proposed adjudication and order, which the Board treated as a brief on exceptions under the General Rules of Administrative Practice and Procedure, 1 Pa. Code § 35.211 (relating to procedure to except to proposed report). On September 2, 2004, the Commonwealth filed its brief opposing exceptions. On September 28, 2004, the Commonwealth filed a motion to strike the Respondent's reply brief under 1 Pa. Code § 35.211. Respondent filed a "Response: To Commonwealth's Motion to Strike" on October 12, 2004. At the October 22, 2004, Board meeting, the Board granted the Commonwealth's motion to strike. Section 35.211 of the General Rules of Administrative Practice and Procedure, 1 Pa. Code § 35.211, provides for the procedure to except to the proposed report as follows:

§ 35.211. Procedure to except to proposed report.

A participant desiring to appeal to the agency head shall, within 30 days after the service of a copy of a proposed report or such other time as may be fixed by the agency head, file exceptions to the proposed report or part thereof in a brief (designated "brief on exceptions"). "Briefs opposing exceptions" may be filed in response to briefs on exceptions within 20 days after the time limited for the filing of briefs on exceptions or such other time as may be fixed by the agency head. **No further response will be entertained unless the agency head, with or without motion, so orders.**

1 Pa.Code §35.211 (emphasis added).

No further response was ordered by the Board, therefore, the motion to strike Respondent's reply brief was granted and the Board reviewed the hearing examiner's proposed adjudication and order and the record, including Respondent's brief on exceptions filed on August 18, 2004, and the Commonwealth's brief opposing objections filed on September 2, 2004. The Board did not consider Respondent's reply brief in its deliberations on this matter.

In his brief on exceptions, Respondent again argues that he did not receive notice of the audit request from the Board with regard to his continuing education for the period April 1, 1999, through March 31, 2001. Respondent argues that the burden of proof is on the Commonwealth to prove that he received notice of the audit. The Board finds that the Com-

monwealth has met that burden. The record in this matter establishes that the Board sent Respondent a notice, via first class mail to his address of record, 2663 Northwood Avenue, Easton, PA 18042, on September 10, 2001, informing him that he was selected for participation in a random audit and directed him to provide copies of certificates of attendance in support of his certification to the Board at P.O. Box 2649, Harrisburg, PA 17105-2649. In addition, the Board mailed a final notice of the continuing education audit to Respondent via certified mail, return receipt requested, to the same address, on August 7, 2002. The United States Postal Service returned the second notice to the Board on August 30, 2002 marked "unclaimed". Respondent cites "the Laws of Civil Procedure" for the proposition that the Commonwealth failed to provide notice. However, Respondent fails to provide any legal authority in support of his position that the mailings provided by the Board do not meet the legal requirements of "notice". On the other hand, there is an extensive line of Commonwealth Court decisions, dating back to 1980, describing the type of notice required in an administrative proceeding to comport with due process requirements. See, for example, Clark v. Com., D.P.W., 58 Pa. Cwmlth. 142, 427 A.2d 712 (1981) (citing Mullane v. Central Hanover Bank and Trust Co., 339 U.S. 306, 314 (1950) for the proposition that [a]dequate notice of administrative action is notice which is "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections" and holding that notice sent to one's last know place of residence is reasonably calculated to give that individual actual notice of the administrative action.) Several other subsequent deci-

sions support the same determination. In particular, the Commonwealth Court found that at claimant for unemployment compensation benefits received adequate notice of a rescheduled hearing when the notice was "directed by mail to the 'last know address...furnished' by the employer." John Kenneth, Ltd. v. Com., U.C.B.R., 66 Pa. Cmwlth. 377, 379, 444 A.2d 824, 826 (1982). In that case, the Court simply ruled that "[w]here notice, mailed to a party's last know address, is not returned by the postal authorities as undeliverable, the party is presumed to have received notice." See also, Deb-Rob Taxi Company v. Pa. P.U.C., 98 Pa. Cmwlth. 397, 511 A.2d 284 (1986); Kobylski v. Com., Milk Marketing Board, 101 Pa. Cmwlth. 155, 516 A.2d 75 (1986); Milford Township Board of Supervisors v. Dept. of Environmental Resources, 165 Pa. Cmwlth. 14, 644 A.2d 217 (1994); and Chartiers Industrial and Commercial Development Authority v. The Allegheny County Board of Property Assessment, Appeals and Review, 165 Pa. Cmwlth. 671, 645 A.2d 944 (1994). In each of these cases, the Court found that notice mailed to a party's last known address and not returned by the post office was reasonable notice. Absolute certainty and actual notice are not required to meet due process standards; "what is constitutionally required is notice which is reasonably calculated, under all circumstances, to inform the interested parties that action against them is pending...Notice of administrative action which is mailed to the interested party's last know address had been found to be reasonable notice." Kobylski, supra, at 159, 516 A.2d at 77. Moreover, actual notice is not required to meet the constitutional standard; constructive notice is sufficient. Id. at 160, 516 A.2d at 77. Personal receipt of the notice is not required

when the notice was mailed to the party's last know address. Milford Township Board of Supervisors, supra at 18, 644 A.2d at 219. Furthermore, proof that an item was mailed raises a rebuttable presumption that the item mailed was received; the presumption cannot be negated solely by testimony that the item mailed was not received. Chartiers Industrial and Commercial Development Authority, supra, at 671, 645 A.2d at 946. Thus, despite Respondent's claims to the contrary, the first audit notice sent by regular mail on September 10, 2001, raises a presumption that it was received. The burden then shifted to Respondent to demonstrate that it was not received. Respondent failed to appear at the hearing to rebut the presumption. The letter Respondent sent to the hearing examiner in lieu of appearing at the hearing does not suffice to rebut the presumption. The board also notes that Respondent received all of the pleadings filed in this matter, which were mailed to the same address the audit notices were originally mailed to. For these reasons, the Board finds that notice of the audit was sufficient.

In addition, Respondent claims in his brief that when he received notice of the disciplinary action, he sent proof of continuing education to "the Board" on or about November 22, 2002. The notices of the audit mailed to Respondent on September 10, 2001, and August 7, 2002, informed Respondent that the was to mail copies of his continuing education certificates to the Board's administrative offices at P.O. Box 2649, Harrisburg, Pennsylvania 17105. He did not do so. The original order to show cause filed on October 24, 2002, directed Respondent to file an answer. On November 18, 2002, Respondent filed an answer as directed, stating that

there was no notice for the audit, therefore there is not basis for this claim. Respondent did not file proof of continuing education with his answer. The Commonwealth filed an amended order to show cause on December 31, 2002, which again provided directions to Respondent regarding the filing of an answer. Again Respondent filed an answer claiming that there was no notice of audit. In his answer, Respondent referred to copies of continuing education certificates that were allegedly faxed to Board Member Dr. Howells. No proof of continuing education was filed with this answer. A hearing was scheduled for September 3, 2003, before Hearing Examiner Frank C. Kahoe, Jr. Respondent failed to appear at the hearing but rather submitted a document (Exhibit R-1) again claiming that there was no notice of the audit, that he does not accept certified mail, and that the had submitted the required continuing education credits to a board member via fax on November 18, 2002. Respondent received notice of the proceedings and chose to waive his rights to be present at the hearing. In spite of that fact, the hearing examiner chose to admit Respondent's letter, received by the Prothonotary on August 29, 2003, and attachments as Exhibit R-1. Attached to the letter to Mr. Kahoe were copies of certificates of attendance at continuing education courses during the audited biennium (April 1, 1999 to March 31, 2001). The Commonwealth's prosecuting attorney, Paul Jarabeck, noted that this was the first time he had seen these documents. (N.T. 8-9)

The hearing examiner found that Respondent is subject to disciplinary action under section 4.1(a)(6) of the Dental Law (Act), 63 P.S. § 123.1(a)(6), by reason of his failure to pro-

vide a copy of the documentation supporting the completion of the required credit hours of continuing education when requested by the Board under section 33.404 of the Board's regulations regarding reporting continuing education credit hours, 49 Pa. Code §33.404. The Board agrees. As to the proposed sanction, the Board agrees with the Commonwealth and the hearing examiner that a $1,000 civil penalty and public reprimand are reasonable under these circumstances.

Accordingly the following order is entered:

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF STATE
STATE BOARD OF DENTISTRY

Commonwealth of Pennsylvania	:
Bureau of Professional and	:
Occupational Affairs	: Docket No. 1371-46-02
v.	: File No. 02-04951
Philip J. Taverna, D.D.S.	:
Respondent	:

ORDER

AND NOW, this 36th day of April, 2005, in accordance with the foregoing findings of fact, conclusions of law, and discussion, the State Broad of Dentistry, having duly convened and considered the entire record in this proceeding, hereby **ORDERS** that Respondent, Philip J. Taverna, D.D.S., license no. DS-019752-L, pay a **$1,000 CIVIL PENALTY** and receive a **PUBLIC REPRIMAND.**

The civil penalty shall be paid by certified check, cashier's check or U.S. Postal Service money order to the "Commonwealth of Pennsylvania" and mailed to:

Cynthia K. Montgomery
Board Counsel
P.O. Box 2649
Harrisburg, Pennsylvania 17105-2649

If Respondent fails to pay to the civil penalty by May 26, 2005, the effective date of this order, Respondent's dental

license, no DS-019752-L, shall be INDEFINITELY SUSPENDED until the civil penalty is paid in full.

This order shall take effect 30 days form the date of mailing shown below, namely on May 26, 2005.

BY ORDER:

BUREAU OF PROFESIONAL AND OCCUPATIONAL AFFAIRS

STATE BOARD OF DENTISTRY

Basil L. Merenda
Commissioner

Veasey B. Cullen Jr.
Chairperson

Respondent's Address: Philip J. Taverna, D.D.S.
2663 Northwood Avenue
Easton, PA 18045

Commonwealth's Atty: Paul J. Jarabeck, Esq.
P.O. Box 2649
Harrisburg, PA 17105

Board Counsel: Cynthia K. Montgomery, Esq.
P.O. Box 2649
Harrisburg, PA 17105

Date of Mailing: April 26, 2005

Notice

The attached Adjudication and Order/Final Order represents the final agency decision in this matter. It may be appealed to the Commonwealth Court of Pennsylvania by the filing of a Petition for Review with that Court in accordance with the Pennsylvania Rules of Appellate Procedure. If you take an appeal to the Commonwealth Court, you must serve the Board with a copy of your Petition for Review. The agency contact for receiving service of such appeals is:

Board Counsel
P.O. Box 2649
Harrisburg, PA 17105-2649

The name of the individual Board Counsel is identified on the Order page of the Adjudication and Order/Final Order.

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

Philip J. Taverna, D.D.S.,	: No. 69 MAL 2006
Petitioner,	:
	: Petition for Allowance
v.	
Bureau of Professional and Occupational Affairs, State Board of Dentistry,	: of Appeal from the : Order of the : Commonwealth Court
Respondent.	:

ORDER

PER CURIAM

AND NOW, this 21st day of June, 2006, the Petition for Allowance of Appeal is hereby DENIED.

TRUE AND CORRECT COPY
Attest: Jun 21 2006

Norina K. Blynn, Chief Clerk